

Board of Environmental Protection Report to the Joint Standing Committee on Natural Resources

Summary of Activities in Calendar Year 2011

I. Introduction

The Board of Environmental Protection is a citizen board whose members are appointed by the Governor and approved by the Legislature. (38 M.R.S.A. § 341-C). Its purpose is to “provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions.” (38 M.R.S.A. § 341-B).

In 2011 the Legislature enacted Public Law 2011, c. 304 “An Act to Ensure Regulatory Fairness and Reform” (LD 1) which made a number of changes to the Board’s composition and duties. In brief:

- Membership was reduced from 10 to 7 persons and a requirement was added that at least 3 of the members have technical or scientific backgrounds in environmental issues.
- The Board’s rulemaking authority was limited to major substantive rules and certain procedural rules, with routine technical rules delegated to the Commissioner.
- The Board continues to have licensing jurisdiction over projects of statewide significance; however, the definition of such projects was clarified to better reflect legislative intent.
- The Board continues to consider petitions to modify a license, but actions to revoke or suspend a license will be undertaken by the Commissioner.
- Approval of administrative consent agreements to resolve violations of licenses and environmental laws was delegated to the Commissioner.
- The Board’s appeal function with respect to licensing matters and enforcement orders was retained.

In accordance with the transition provisions of LD 1, matters pending before the Board on the effective date of LD 1 were concluded by the Board as opposed to being transferred to the Commissioner. This report summarizes the activities of the Board in 2011.

II. Membership

Board members are chosen to represent a broad range of interests, professional backgrounds, and experiences that help to inform their assessment of the matters before the Board for decision. At least 3 members must have technical or scientific backgrounds in environmental

issues and no more than four members may be residents of the same Congressional District. Members are appointed for staggered four-year terms, and no member may serve more than two consecutive four-year terms. One member of the Board is appointed by the Governor as Chair. Board members volunteer their time, receiving \$55.00 per day plus expenses for their attendance at Board meetings and hearings (5 M.R.S.A. § 12004-D(2)). The Chair is Susan Lessard of Hampden.

In accordance with LD 1, the number of Board members was reduced from ten to seven effective September 16, 2011. At that time, Governor Paul LePage reappointed Susan Lessard of Hampden as Chair, and appointed new members Alvin Ahlers of North Yarmouth, Gary Curtis of Bethel, and Robert Foley of Wells. Members Elizabeth Ehrenfeld of Falmouth, M. Wing Goodale of Falmouth, and Richard Gould of Greenville who had each been appointed to a second term by Governor John Baldacci continued their service. The following Board members completed their service on the Board: Don Guimond of Fort Kent (2 terms), Matt Scott of Belgrade (2 terms), Lissa Widoff of Freedom (1 term), and Frank Woodard of Falmouth (1 term).

See Attachment A for biographical information on the current Board members.

III. Responsibilities and Duties

The Board's responsibilities are set forth in statute (38 M.R.S.A. § 341-D) and include:

- Major Substantive Rulemaking: the Board holds public hearings on, and provisionally adopts, major substantive rules of the Department;
- Decisions on selected permit applications: the Department's statutes specify that certain applications must be evaluated and decided by the Board;
- Appeals of certain Commissioner licensing and enforcement actions;
- Petitions: the Board considers petitions to modify a license or require corrective action that are referred to it by the Commissioner; and
- Recommendations to the Legislature: the Board is charged with making recommendations to the Legislature on the implementation of environmental laws.

Proceedings before the Board are governed by the Maine Administrative Procedure Act, the Board's procedural statutes and rules governing various types of proceedings (e.g. rulemaking, appeal proceeding, etc.) and by program-specific statutes and rules governing matters such as the control of air emissions, waste management and land use. All meetings of the Board are noticed and open to the public.

Title 38 § 341-D(7) requires the Board of Environmental Protection to report to the joint standing committee having jurisdiction over natural resource matters by January 15 of the first regular session of each Legislature on the "effectiveness of the environmental laws of the State and any recommendations for amending those laws or the laws governing the board." Although not required this session, the Board generally provides an annual summary of its

activities to the Committee which may be helpful to document the changes implemented in accordance with LD 1.

IV. Recommendations

The Board will be referring 3 major substantive rules to the Committee for its consideration in the Second Regular Session of the 125th Legislature: Chapter 375, section 10, subsection I regarding noise from wind energy developments; Chapter 305, section 20 permit-by-rule for activities in moderate inland waterfowl and wading bird habitat; and Chapter 378 amendments regarding the storage of diesel fuel on significant sand and gravel aquifers by licensed mining operations. The Board has not concluded its work on Chapters 305 (20) and Chapter 378; therefore, the Board does not comment on these rules at this time.

Noise from Wind Energy Developments

Public Law 2007, chapter 661 “An Act to Implement Recommendations of the Governor’s Task Force on Wind Power Development” expedited the permitting of wind energy projects in certain locations. Since enactment of the law, all of the major projects approved within the organized areas of the State have been appealed to the Board.

While a number of issues have been raised in these appeals, the major issue common to all has been concern over the potential effects of sound from the turbines on human health and welfare. In each instance, the appellants have argued that the Department’s existing rules governing noise (last amended in 1989) do not adequately address the type of noise associated with wind energy development. In each of these proceedings, the Board was presented with a significant amount of information on various wavelengths and levels of sound, sound propagation, potential impacts of sound on human health, and arguments that the Department’s rules need to be revised to reflect the unique aspects of sound generated by wind turbines.

In December 2010, the Board received a petition for rulemaking pursuant to 5 M.R.S.A. § 8055 proposing changes to the Department’s Chapter 375 rules governing noise. The Board retained the services of EnRad to assist in its review of the draft rule submitted by the petitioners and the analysis of technical information submitted by the petitioners, regulated community and interested public during the hearing and post-hearing comment period. During a lengthy hearing (10+ hours), the Board heard expert witnesses for the petitioners and for industry as well as testimony from the interested public. After several deliberative sessions, the Board provisionally adopted a rule which establishes sound level limits, addresses the issues of tonal sound and short duration repetitive sound, specifies the technical information which must be submitted by applicants, specifies measurement procedures, and establishes requirements for the reporting of compliance data. The rule builds upon Department experience gained from the review of proposed projects to date, and incorporates many of the procedures informally used by Department staff in its review of wind energy developments.

The Board recognizes that the technology of wind energy will continue to evolve and, as with any rule, amendments will likely be needed as we gain greater experience. The Board believes

that the proposed rule is supported by the science and Department experience to date. It provides greater clarity for applicants and addresses the major issues raised by persons living in the vicinity of wind energy developments. The Board urges your favorable consideration of this rule.

V. Summary of Matters before the Board in 2011

The Board's statutory responsibilities are established in 38 M.R.S.A. § 341-D. These responsibilities include the following: major substantive rulemaking; decisions on selected permit applications; decisions on appeals of the Commissioner's licensing and enforcement actions; consideration of petitions to modify a license referred to it by the Commissioner; and recommendations to the Legislature for changes to law. This section summarizes the major actions of the Board in 2011.

A. Rulemaking and Related Matters

LD 1 "An Act to Ensure Regulatory Fairness and Reform" (PL 2011, c. 304) modified the Board's rulemaking authority. In accordance with 38 MRSA § 341-H, subsection 1, the Board shall "adopt, amend or appeal only those rules of the department designated as major substantive rules pursuant to Title 5, chapter 375, subchapter 2-A... and routine technical rules as necessary for the conduct of the department's business, including the processing of applications, the conduct of hearings and other administrative matters." The Commissioner has the authority to adopt, amend or repeal routine technical rules (38 MRSA § 341-H, subsection 2). In instances where rulemaking was initiated on routine technical rules prior to the effective date of LD 1, the rulemaking proceeding was completed by the Board.

Rulemaking is generally initiated by the Commissioner. During 2011, the Board considered 12 rules or rule amendments referred to it by the Commissioner, 6 involving major substantive rules and 6 involving routine technical rules. As discussed in Section IV of this report, one rulemaking was in response to a citizen petition pursuant to 5 M.R.S.A., section 8055. Rulemaking proceedings in 2011 are summarized below.

- Chapter 100 Definitions (Air Bureau) / Amendments. In May 2010, the U.S. EPA issued a final rule addressing greenhouse gas emissions from stationary sources under the Clean Air Act permitting programs. The amendments to Chapter 100 allow Maine to implement its major source licensing program for greenhouse gases. The amendments included definitions related to greenhouse gases and CO2 equivalent emissions. A public hearing was held on November 18, 2010. The amendments were adopted by the Board on February 3, 2011.
- Chapter 117 Source Surveillance – Emissions Monitoring / Repeal and Replace. The rule specifies air emission sources that are required to operate continuous air emission monitoring systems and details the performance specifications, quality assurance requirements, and quality control procedures for such systems. The rule was last updated in

1994. A public hearing on the proposed changes was held on December 16, 2010. The revised rule was adopted by the Board on April 21, 2011.

- Chapter 118 Gasoline Dispensing Facilities Vapor Control / Amendments. The amendments repeal the Stage II gasoline vapor recovery requirement effective January 1, 2012 and require the removal and/or discontinuance of Stage II vapor controls by January 1, 2013. A public hearing was held on November 18, 2010. The amendments were adopted on January 6, 2011.
- Chapter 129 Surface Coating Facilities / Amendments. The Clean Air Act requires control technology on certain sources of VOC (volatile organic compound) emissions that contribute to the formation of ground-level ozone. The amendments expand coverage to include exterior siding and tile board and would modify requirements for metal finishing and flatwood panel coating operations. The proposed amendments were posted for comment on September 2, 2010. The amendments were adopted on January 6, 2011.
- Chapter 305 Natural Resources Protection Act Permit-by-Rule Section 16 Activities in Coastal Sand Dunes / Amendments. (Major Substantive). The amendments incorporate definition changes and allow additional activities in existing developed areas. The changes also allow new activities in a sand dune such as winter cobble-trapping fences. The amendments were posted for public comment on October 7, 2010. The amendments were provisionally adopted on December 16, 2010, and finally adopted on June 16, 2011.
- Chapter 305 Natural Resources Protection Act Permit-by-Rule Section 20 Activities Located In, On, or Over High or Moderate Value Inland Waterfowl and Wading Bird Habitat, or Shorebird Nesting, Feeding and Staging Areas. (Major Substantive). P. L. 2011, Chapter 359, directed the Department to amend its rules concerning permit-by-rule (PBR) to allow activities occurring in high or moderate value waterfowl and wading bird habitat to be eligible for PBR. The proposed amendments would allow new development in moderate value inland waterfowl and wading bird habitat provided the development is located at least 100 feet back from the upland edge of the wetland and occupies no more than 20% of the lot within the habitat. The rule amendment was posted on November 3, 2011, and a public hearing was held on December 1, 2011. Given issues raised at the hearing, the Board continued the hearing to December 15, 2011 to receive expert testimony from staff of the Department of Inland Fisheries and Wildlife. Action on the proposed rule amendment is anticipated in early 2012.
- Chapter 375 No Adverse Environmental Effect Standard of the Site Location Law, Control of Noise, Sound Level Limits for Measurements for Wind Turbine Projects. (Major Substantive). This rulemaking was initiated in response to a citizen petition pursuant to 5 M.R.S.A. § 8055. A public hearing was held on July 7, 2011. Deliberative sessions were held on July 21, 2011, July 28, 2011, and August 8, 2011, at which time the rule was posted for additional comment with a deadline of August 29, 2011. The rule was provisionally adopted by the Board on September 15, 2011 and has been forwarded to the Legislature for its consideration.

- Chapter 378 Variance Criteria for the Excavation of Rock, Borrow, Topsoil, Clay or Silt and the Performance Standards for the Storage of Petroleum Products. (Major Substantive). A resolve, PL 2011, Chapter 26, directed the Department to allow licensed mining operations to store a small amount of diesel fuel on significant sand and gravel aquifers mapped by the Maine Geological Survey. A public hearing was held the proposed rule amendments on November 3, 2011. Action on the proposed rule is anticipated in early 2012.
- Chapter 425 Asbestos Management Regulations / Amendments. The proposed amendments update the rule to reflect statutory changes, clarify certain definitions and requirements, and integrate changes to standard industry practices. A public hearing was held on November 18, 2010. The amendments were adopted on March 17, 2011.
- Chapter 692 Siting of Oil Storage Facilities / Amendments. (Major Substantive). The proposed changes would have amended the Department's current regulations restricting the siting of new oil facilities in significant sand and gravel aquifers. The proposed amendment was in response to Legislative resolve (P.L. 2011, Chapter 26). It would have allowed for the storage of up to 1,100 gallons of diesel fuel for fueling heavy equipment used in the mining of sand and gravel from pits located in significant sand and gravel aquifers mapped by the Maine Geological Survey. The rule amendment would also have exempted proposed new oil storage facilities on a site erroneously mapped as a significant sand and gravel aquifer and urban locations where ground water has already been contaminated and no longer is useable as drinking water. A public hearing was held on November 3, 2011. In response to issues raised at the hearing by the regulated community, the rulemaking was terminated on November 3, 2011 to allow Department staff to pursue resolution of issues in dispute with the regulated community.
- Chapter 693 Operator Training for Oil and Hazardous Substance Storage Facilities / New. The rule proposed to establish training requirements for operators of oil storage facilities and hazardous waste storage facilities to satisfy minimum training requirements specified by Section 1524 of the U.S. Energy Policy Act. A public hearing was held on October 7, 2010. The rule was posted for additional public comment on December 16, 2010, and the comment period further extended on February 3, 2011. The rulemaking was subsequently terminated by the Commissioner.
- Chapter 882 Designation of Bisphenol A as a Priority Chemical and Regulation of Bisphenol A in Children's Products / New. (Major Substantive). The rule lists bisphenol A as a priority chemical, requires reporting for certain categories of products containing bisphenol A, and prohibits the sale of certain other products containing bisphenol A. A public hearing was held on August 19, 2010. The rule, with the exception of Section 5 (Sales prohibition of children's products containing bisphenol A), was adopted on December 16, 2010. Section 5 was provisionally adopted on December 16, 2010 and finally adopted by the Board on June 16, 2011.

- Chapter 900 Biomedical Waste Management Rules / Amendments. Department staff proposed to amend the rule to eliminate the provision that sharps such as needles and syringes be shredded after disinfection and prior to disposal in a landfill. The rule was posted for public comment on April 21, 2011, and the amendment was adopted on July 21, 2011.

B. Major Applications

In LD 1, the Legislature made changes to the provisions of statute that specifies which permits will be decided by the Board. In accordance with 38 M.R.S.A. § 341-D(2), the Board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance. A project of statewide significance is a project that meets at least 3 of the following 4 criteria:

- Will have an environmental or economic impact in more than one municipality, territory or county;
- Involves an activity not previously permitted or licensed in the State;
- Is likely to come under significant public scrutiny; and
- Is located in more than one municipality, territory or county.

The Board shall also decide each application referred to it jointly by the Commissioner and the applicant.

There were no applications for projects of statewide significance pending before the Board in 2011.

C. Appeals of Department Licensing Decisions

If an applicant or another person is aggrieved by a licensing decision of the Commissioner, the Commissioner's decision may be appealed to the Board or to Superior Court. Under provisions of 38 M.R.S.A. §341-D(4), the Board may affirm, amend, or reverse the Commissioner's decision, or remand the matter to the Commissioner for further proceedings. The Board's review on appeal is *de novo* in that the Board is not bound by the Commissioner's findings of fact or conclusions of law. Except in limited circumstances set forth in rule, the record for appeals heard by the Board is limited to the administrative record prepared by the Department in its review of the application. The Board's goal is to process appeals expeditiously in accordance with the Department's procedural rules, the requirements of the Maine Administrative Procedure Act, and program specific statutes and rules. The Board's decision on appeal may be appealed to Superior Court (or the Law Court in the case of an expedited wind energy development).

Appeals of Commissioner licensing decisions considered by the Board in 2011 are summarized below.

- Old Town, Juniper Ridge Landfill. Appeal of a Solid Waste Order changing the Municipal Solid Waste (MSW) Bypass Limit. The appeal filed by the Municipal Review Committee and Penobscot Energy Recovery Company objected to provisions regarding the use of municipal solid waste bypass for the “soft layer” in the landfill. The Board denied the appeal and affirmed the Commissioner’s decision.
- Spruce Mountain Wind Project. Appeal of Department approval of an 18 to 20 MW expedited wind energy development proposed for Woodstock, Oxford County. The appeal was filed by Friends of Spruce Mountain. The major issues raised in the appeal were: noise, provisions for decommissioning the facility at the end of its useful life, and scenic impacts. The Board denied the appeal and affirmed the Commissioner’s decision.
- Berwick Iron & Metal Recycling, Inc. Appeal of air emission license for automobile shredding operation. The appeal was filed by Berwick residents, including abutters to the project site. Appellants expressed concerns about noise, hours of operation, impacts to air quality and what they believed were procedural inadequacies in the processing of the application. The Board denied the appeal and affirmed the Commissioner’s decision.
- BB Development LLC. Appeal of Site Location and Natural Resources Protection Act permit approval for the Oxford Resort Casino, Phase 1. The appellants objected to a number of findings including those regarding financial capacity, noise, visual quality, adequate water supply, potential impacts to groundwater, and impacts to wetlands. The Board modified the permit, adding provisions requiring a demonstration of financial capacity and a demonstration of adequate water supply prior to construction of the facility.
- U.S. Army Corps of Engineers / Maintenance Dredging of the Kennebec River / Appeal of Natural Resources Protection Act permit and Water Quality Certification. Appellants objected to the timing of the maintenance dredge in August and expressed concerns over potential adverse impacts to fishing, clamming and recreation in the Kennebec River. The Board denied the appeal and affirmed the Commissioner’s decision.
- Residential Subdivision, Yarmouth. Appeal of Site Location and Natural Resources Protection Act permits, and Water Quality Certification for a residential subdivision. The appellant expressed concerns regarding potential impacts to wetlands, inadequate soils, stormwater management and water quality. The Board found that the person filing the appeal did not demonstrate a particularized injury and therefore did not have standing to bring the appeal. The appeal was dismissed.

Pending Appeals:

- S.D. Warren Company. Appeal of Water Quality Certification for the Eel Weir Hydropower Project, Sebago Lake, Cumberland County. The appellant objects to the lake level management plan citing adverse impacts to recreation, navigation and aquatic habitat. The certification was also appealed to Superior Court by another entity. The appeal is on hold pending a request before Superior Court regarding consolidation of the appeals.

- Saddleback Ridge Wind, LLC. Carthage, Canton and Dixfield, Franklin and Oxford Counties. Appeal of Site Location and Natural Resources Protection Act permits and Water Quality Certification. Appellants object to the project on the basis of excessive noise from wind turbines and unreasonable visual impact. The matter has not yet been scheduled for consideration by the Board.

D. Petitions to Modify, Suspend or Revoke a License

The petition process is a mechanism to re-open a final license that was issued by the Department if certain conditions are found to exist. This provision of statute was amended by LD 1 to limit the Board's role to consideration of petitions to modify a license or order corrective action. As amended Title 38 § 341-D(3) provides that the Board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, whenever the Board finds that:

- The licensee has violated any condition of the license;
- The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- The licensed discharge or activity poses a threat to human health or the environment;
- The license fails to include any standard or limitation legally required on the date of issuance;
- There has been a change in any condition or circumstance that requires corrective action or a temporary or permanent modification of the terms of the license;
- The licensee has violated any law administered by the Department; or
- The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

In 2011, the Board considered the following petitions:

- Construction of Footbridge, Owls Head, Knox County. Appeal of Natural Resources Protection Act Permit-by-Rule. The petitioners argued that the licensee failed to fully disclose all relevant facts and failed to provide public notice of the project. After hearing arguments from the petitioners and the licensee, the Board dismissed the petition.
- Berwick Iron & Metal Recycling, Inc., Berwick, York County. Petition to modify, revoke or suspend the air emission license for the automobile shredding operation. The petition was filed following an unsuccessful appeal by Berwick residents, including abutters to the project site. Petitioners alleged that the licensee had violated laws administered by the Department, misrepresented or failed to disclose fully all relevant facts during the processing of the application and that a change in circumstances warranted modification, suspension or revocation of the license. After hearing arguments from the petitioners and the licensee, the Board dismissed the petition.

E. Appeal of Administrative Orders Issued by the Commissioner

A number of the Department's program specific statutes provide for appeals to the Board of a Commissioner Administrative Order, such as an order to remediate a site contaminated by oil or hazardous substances. These are unilateral orders through which the Commissioner seeks to correct serious environmental conditions. Due process is afforded through the right of appeal to the Board, and eventually Superior Court. There were no appeals of Commissioner Orders in 2011.

F. Enforcement Actions

The decision on whether to take enforcement action in a given situation is the prerogative of the Commissioner, and violations of law can be resolved at a variety of levels. In instances where the Commissioner determines that an administrative consent agreement is appropriate, the Board historically has been required to approve such agreements. This responsibility was eliminated in LD 1; accordingly, the Board no longer reviews administrative consent agreements.

During 2011, the Board approved 18 Administrative Consent Agreements prior to the changes enacted by LD 1. The Board remanded one agreement back to the Department for re-evaluation. The administrative consent agreements approved by the Board in 2011 by program area and relevant statute and/or rule are listed below.

Air

- Protection and Improvement of Air Law, air emission standards and license conditions (5).

Hazardous Waste, Solid Waste, Oil Discharge

- Hazardous Waste Management Regulations (2).
- Oil Discharge Prevention and Pollution Control Law (1).

Land and Water

- Natural Resources Protection Act (3): One of these also involved violations of the Erosion and Sedimentation Control Law.
- Performance Standards for Excavations (3).
- Waste Discharge License (2).
- Site Location of Development Law and Natural Resources Protection Act (2).

G. Informational Workshops

Department staff provides informational workshops at regularly scheduled Board meetings throughout the year for the benefit of Board members and any members of the public who wish to attend. Workshops in 2011 addressed:

- Rulemaking

- Natural Resources Protection Act
- State Water Classification System.

V. Closing (Susan – what do you want to say here?)

Over the past year, we have seen changes to the role of the Board and are working with the Commissioner to implement those changes in an efficient manner. Members consider it a privilege to serve the people of Maine on the Board of Environmental Protection. We are dedicated to carrying out our statutory responsibilities in a fair and efficient manner that protects the due process rights of all parties and provides for credible public participation in Board proceedings. We hope that this report provides Committee members with a helpful overview of our activities in 2011. I welcome the opportunity to review the report with you at your convenience.

Respectfully submitted,

Susan M. Lessard, Chair
Board of Environmental Protection

Attachments:

- A. Board Members: List and Biographical Information
- B. 2011 Meeting Agendas

